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Via Hand Delivery
The Honorable Marvin J. Garbis
United States District Judge
Garmatz United States Courthouse
101 West Lombard Street
Chambers 5-C
Baltimore, Maryland 21201

Re: *In Re Municipal Mortgage & Equity, LLC, Securities And Derivative Litigation*
MDL 08-MD-1961 – All Actions

Dear Judge Garbis:

We are Plaintiffs' co-lead counsel in the above-entitled matter (the "Action"). We submit this letter to bring to the Court's attention recent decisions, *Iowa Pub. Employees' Ret. Sys. v. MF Global, Ltd.*, No. 09-3919, 2010 U.S. App. LEXIS 19138 (2d Cir. Sept. 14, 2010) ("*MF Global*") (Ex. A),[1] *Schleicher v. Wendt*, No. 09-2154, 2010 U.S. App. LEXIS 17367 (7th Cir. Aug. 20, 2010) (Ex. B), and *In re Bank of America Corp. Sec. Deriv. and ERISA Litig.*, 09MD2058 (PKC), 2010 U.S. Dist. LEXIS 89199 (S.D.N.Y. Aug. 27, 2010) ("*BofA*") (Ex. C), and to briefly reply to the letter from Defendants' counsel, Mark Holland, dated July 29, 2010 ("July 29 Letter"), responding to Plaintiffs' letter to the Court of June 30, 2010.

A. *Schleicher v. Wendt*

Defendants have previously cited cases that relied for their reasoning on *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007), arguing that Plaintiffs must present evidence, at the pleading stage, that disclosure of corrective information actually caused Plaintiffs' losses.[2] In *Schleicher*, Judge Easterbrook, at the more fact-intensive class certification stage, forcefully rejected the reasoning of *Oscar Private Equity* as contrary to logic and controlling Supreme Court precedent. *See* 2010 U.S. App. LEXIS 17367, *5-6.[3] Moreover, the Seventh Circuit recognized that both materiality and loss causation may be sufficiently pleaded in cases where the price of the issuer's stock declined in value throughout the class period and did not rise on the alleged misstatements, recognizing that a defendant's false statements can slow the rate of the decline in the price of a company's stock during the class period, rather than "propel the stock's price upward." *See id.* at *6-7. In *Schleicher*, plaintiffs alleged that defendants made unduly optimistic statements to conceal the full extent of the company's losses until it filed for bankruptcy. Defendants argued that plaintiffs have to prove that the statements actually caused material changes in stock prices. In rejecting defendants' argument, the Seventh Circuit explained that "when an unduly optimistic statement stops a price from declining (by adding some good news to the mix): once the truth comes out, the price drops to where it would have been had the statement not been made. . . . Whether the numbers are black or red, the fraud lies in an intentionally false or misleading statement, and the loss is realized when the truth turns out to be worse than the statement implied." *Id.* at *7-9.

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[1] References to "Ex. __" refer to exhibits annexed hereto.

[2] *See, e.g.*, Defendant Municipal Mortgage & Equity, LLC ("MuniMae") and the Individual Defendants' Notice of Supplemental Authority in Support of their Motion to Dismiss the Consolidated Amended Class Action Complaint, Dkt. No. 101, at 7-9 (citing cases relying on the reasoning in *Oscar Private Equity*).

[3] Notably, no court in the Fourth Circuit has adopted the reasoning of *Oscar Private Equity*.

B. *Iowa Pub. Employees' Ret. Sys. v. MF Global, Ltd.*

In *MF Global*, which involved claims under the Securities Act of 1933 (the "1933 Act"), plaintiffs alleged that the prospectus failed to disclose gaps in the company's internal controls. *See* 2010 U.S. App. LEXIS 19138, at *13-14. The Second Circuit found that the allegation "specifies an omission of present fact, to which bespeaks caution does not apply: The applicability of MF Global's risk-management system to employee accounts was ascertainable when the challenged statements were made. It was therefore error for the district court to rely on the bespeaks-caution doctrine to dismiss that claim." *Id.* The Second Circuit went on to explain that "[a] forward-looking statement (accompanied by cautionary language) expresses the issuer's inherently contingent prediction of risk or future cash flow; a non-forward-looking statement provides an ascertainable or verifiable basis for the investor to make his own prediction." *Id.* at *17. The Second Circuit further explained that "[a] characterization of present or historical fact may be partially predictive" and "[a] present fact like an appraisal or valuation may depend on predictions: of future cash flows for example, or future risks." *Id.* at *17-18.

In the instant case, Defendants stated on September 13, 2006 that "[t]he restatement will not impact cash available for distribution . . . or the Company's ability to pay future distributions to common shareholders." ¶¶14, 220-21. As in *MF Global*, this statement was not just a prediction that MMA would pay a particular future dividend or dividend amount, but a statement that a particular risk – the second restatement – "***will not*** impact cash available for distribution [("CAD")] . . . ***or*** the Company's ability to pay future distributions to common shareholders." *See, e.g.*, ¶¶220-21 (emphasis added). Further, when Defendants made the statement, they knew, based on their extensive involvement in the restatement process, that the costs of the restatement would – and did – impact CAD and the dividend. This fact is conceded by Defendants' admission on January 28, 2008 that the 37% dividend cut was, in part, "due to the cost of the Company's ongoing restatement of its financial statements." ¶¶233, 34. Thus, Defendants' statements are not protected by the bespeaks caution doctrine.

C. *In re Bank of America Corp. Sec. Deriv. and ERISA Litig.*

As discussed at oral argument, Defendants' loss causation argument is, in fact, a disguised "truth-on-the-market" defense. *See* Transcript of the June 23, 2010 Argument ("Trans.") at 97, lines 22-24. *BofA* squarely held that a defendant's misstatements and omissions can cause the ultimate loss to plaintiffs where both truthful adverse information and materially false statements and omissions are provided to the public simultaneously. *See* 2010 U.S. Dist. LEXIS 89199, at *86-92. Further, *BofA* holds that "upon choosing to speak, one must speak truthfully about material issues." *Id.* at *77 (citing *Caiola v. Citibank, N.A., New York*, 295 F.3d 312, 331 (2d Cir. 2002)). *BofA* reiterated that information offered to establish a truth-on-the-market defense "must be communicated 'with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by the alleged misstatements.'" *Id.* at *90 (citing *Ganino v. Citizens Utils. Co.*, 228 F.3d 154 (2d Cir. 2000) (citation omitted)).

Thus, ***"[t]he truth-on-the-market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a . . . complaint for failure to plead materiality."*** *Id.* at *90 (emphasis added) (quoting *Ganino*, 228 F.3d at 187). Even if information about the negative impact of consolidating the VIEs was publicly available, in order for Defendants to establish a truth-on-the-market defense, they must demonstrate at this stage that the purported information was "transmitted to the public with a degree of intensity and credibility sufficient to effectively counter-balance any misleading impression created by the insiders' one-sided representations." *See In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1117 (9th Cir. 1989).

D. Plaintiffs' Response to the July 29, 2010 Letter

With respect to the July 29, 2010 Letter, Plaintiffs submit the following:

First, Defendants seek to distinguish the facts of *Klugman, et al. v. American Capital Ltd., et al.*, No. 8:09-cv-00005-PJM (D. Md.), where District Judge Peter J. Messitte denied, in its entirety, a motion to dismiss the plaintiffs' complaint brought against defendants for violations of the 1933 Act, the Securities Exchange Act of 1934 (the "1934 Act"), and Rule 10b-5 promulgated thereunder. Rather than engage in a debate over what plaintiffs allege in *Klugman*, Plaintiffs annex hereto, as Exhibit D, a copy of the operative *Klugman* complaint that was sustained by Judge Messitte. That complaint speaks for itself and the facts of *Klugman* are startlingly similar to those here. For the same reasons the defendants' motion to dismiss was denied in *Klugman*, the motions to dismiss should be denied here as well.[4]

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[4] Also, not surprisingly, defendants in *Klugman* attempted to re-cast plaintiffs' claims as a promise to pay future dividends rather than as a failure to disclose known, current risks that would negatively impact the defendant issuer's ability to pay dividends, just as Defendants attempt to do here. At this stage, Plaintiffs are the masters of their Complaint. *See, e.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-

Second, Defendants offer sound bites from the list of cases that they argue support their position that, notwithstanding the plain language of §13 of the 1933 Act, 15 U.S.C. §77m, which flexibly provides that the statute of repose begins on the date the securities were "bona fide offered to the public," that the commencement date is always when the registration statement becomes effective. When these cases are read completely – as opposed to Defendants' incomplete snippets – it becomes clear they do not support Defendants' argument that such a strict rule exists, regardless of any delay in the actual offering of such securities.

Five of the cases are easily distinguishable because there was, as is more typical, no significant delay between the effective date of the registration statement and the actual offering to the public of the shares.[5] The remaining two district court cases that Defendants cite – *In re Metropolitan Sec. Litig.*, No. 04-25, 2010 U.S. Dist. LEXIS 10613 (E.D. Wash. Feb. 8, 2010), and *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, No. 03-1529, 2005 U.S. Dist. LEXIS 14444, (S.D.N.Y. July 18, 2005), simply misread the Second Circuit jurisprudence those cases purport to rely upon.

As the prior briefing makes clear, the latest Court of Appeals decision addressing the issue, *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004) ("*Stolz*"), states that the

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99 (1987); *Tischler v. Baltimore Bancorp*, No. 90-2927, 1992 U.S. Dist. LEXIS 17474, at *9-10 (D. Md. May 15, 1992). Therefore, Defendants' strategy should be rejected here as it was in *Klugman.*

[5] *See Griffin v. Paine Webber Inc.*, 84 F. Supp. 2d 508 (S.D.N.Y. 2000) (two-day delay between the effective date of the registration statement and the date when the securities were priced and offered to the public); *Morse v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 619, 620-22 (S.D.N.Y. 1977) (involving a broker-dealer's solicitation of sales of the securities several months before the effective date of the registration, finding the §11 claims timely and rejecting defendants' argument that the "bona fide offering" date was prior to the effective date of the registration, when sales were solicited by brokers, and deemed the effective date of the registration statement as the "marking point for commencement of the limitations period. . . ."); *Jolly v. Pittore*, No. 92-3593, 1992 U.S. Dist. LEXIS 11527, at *3-4 (S.D.N.Y. Aug. 5, 1992) (no delay between the effective date of the registration statement and the actual sale of securities to the public, and reiterating the undisputed proposition that "***[g]enerally***, a security is 'bona fide offered to the public' on the effective date of the security's registration.") (emphasis added); *Green v. Fund Asset Mgmt., L.P.*, 19 F. Supp. 2d 227, 232-34 (D.N.J. 1998) (no indication of a delay between the effective date and the actual offering and otherwise inapposite because the claims arose under §§8(e), 34(b) and 36(a) of the Investment Company Act of 1940 on behalf of shareholders of closed-end municipal bond funds); *Armstrong v. Am. Pallet Leasing Inc.*, 678 F. Supp. 2d 827, 868 (N.D. Iowa 2009) (does not even address the statute of repose for §11 claims; it deals with §12(a)(2) claims for which Defendants concede a different standard applies (*see* July 29 Letter ("Section 13 expressly states that the repose period for Section 12 claims begins "after the sale…"). Moreover, the court in *Armstrong* ruled that "the only registration statement date mentioned in the First Amended Complaint" was "within three years of such a registration date, making this case timely filed." The court noted that the question as to whether an earlier registration existed was "a factual issue which cannot be resolved on defendants' motions to dismiss."

effective date of the registration statement "has been treated as the date that starts the running of the [three-year] repose period," but that "[t]he relevant question for § 13 is when was the stock really and truly (genuinely) being offered to the public, as opposed to, say, a simulated offering." *See id.* at 99. Defendants – and the cases they cite – rely heavily on *Stolz's* forerunner, *Finkel v. Stratton Corp.*, 962 F.2d 169, 511-12 (2d Cir. 1992), but misread the scope of that decision. *See Stolz*, 355 F.3d at 100 (noting the language relied upon by Defendants here from *Finkel* was *dictum*).

Finkel focused on whether a post-effective amendment to a registration statement for the sale of pre-subscribed condo units was the proper commencement date in that case for the statute of limitations under §13. Prior to addressing that question, the court in *Finkel* noted that "[p]laintiffs concede that, ***ordinarily***, a security is 'bona fide offered to the public' at the effective date of the registration statement." 962 F.2d at 173 (emphasis added). The Second Circuit then found that the date of the registration statement was the relevant measuring point because no securities were offered pursuant to the amendment. *See id.* at 174. Thus, *Finkel* did not establish a bright-line rule that the trigger date is always the effective date of the registration statement, but only that it is "ordinarily" that date.

Thereafter, *Stolz* expanded on *Finkel* applying a test that, consistent with the language of §13, focuses on substance rather than form. And there lies the flaw in Defendants' argument and the cases they cite. For instance, *In re Adelphia,* 2005 U.S. Dist. LEXIS 14444, cites to *Griffin*, 84 F. Supp. 2d at 512, as "quoting *Finkel* [ ], 962 F. 2d [ ] [at] 173," *see Adelphia*, 2005 U.S. Dist. LEXIS 14444, at *11, for the proposition that the effective date of the registration statement is the date the statute of limitations commences, but the page from *Griffin* quoted that supposedly supports its holding ***misquotes*** *Finkel* by leaving out the word "ordinarily" from its quotation of the sentence it purports to quote from *Finkel, cf. Griffin*, 84 F. Supp. 2d at 512, *with Finkel*, 962 F. 2d at 173. Likewise, *In re Metropolitan,* 2010 U.S. Dist. LEXIS 10613, relies on *Finkel*, but fails to recognize that in *Finkel* the Second Circuit did not announce a bright-line test, and simply deferred adopting the proper test until *Stolz*. Thus, the line of cases Defendants rely upon reflect a domino effect from a misreading of *Stolz* and *Finkel*.

Finally, none of the cases either party has cited on this issue is controlling. There are no Fourth Circuit – or even district court decisions from within the Fourth Circuit – answering the question of when a security is "bona fide offered to the public" pursuant to §13 of the 1933 Act. However, the Supreme Court has recently emphasized, in interpreting statutes of limitations under the federal securities laws, that the statute itself is the dispositive source for its application, *see Reynolds v. Merck & Co.*, ___ U.S. ___, 130 S. Ct. 1784, 1794-96 (2010), and the statute at issue here states "[i]n no event shall any such action be brought to enforce a liability created under section 11 or section 12(a)(1) [15 USCS § 77k or § 77l(a)(1)] more than three years ***after the security was bona fide offered to the public,*** or under section 12(a)(2) [15 USCS § 77l(a)(2)] more than three years ***after the sale***" (emphasis added), ***not*** from the "effective date of the registration statement," as Congress could have provided when it enacted the statute in 1933 or with its expansion of various federal securities law statutes of limitations, *see Reynolds*, 130 S. Ct. at 1795 (citing Sarbanes-Oxley Act, 28 U.S.C. §1658(b)). Instead, Congress left the wording as "bona fide offered to the public." Based on a plain reading of the statute, in the words of the *Stolz* court, the statute of limitations can only commence under §13 when the stock "really and truly (genuinely)" was "offered to the public." Here that was, at the earliest, February 2, 2005.

Next, Defendants challenge Plaintiffs' claims arising under §§11 and 12(a)(2) of the 1933 Act as time-barred under the "one year from discovery" prong of §13. 15 U.S.C. §77m. The Complaint makes clear that it was not until January 28 and January 29, 2008, a few days before the first complaint alleging 1933 Act claims was filed on February 1, 2008, that investors were placed on inquiry notice that the Secondary Public Offering and Dividend Reinvestment and Growth Share Purchase Plan ("DRP") registration statements and prospectuses contained material misrepresentations and omissions. This is when Defendants revealed the true scope of the second restatement, what the task entailed, MuniMae's inability to internally accomplish the task, and the exorbitant cost. *See* ¶¶237-40, 247(t).[6]

Defendants' rehashed arguments that Plaintiffs were on inquiry notice as early as September 13, 2006, or, at least by January 31, 2007, *see* July 29 Letter at 8-9, are contrary to the well-pled allegations in the Complaint, *see* 33 Act Opp. at 31-32, that the Court must accept as true. *See Public Employees' Ret. Ass'n v. Deloitte & Touche LLP*, 551 F.3d 305, 312 (4th Cir. 2009). Defendants' assertion that the September 13, 2006 announcement regarding the restatement should have put Plaintiffs on inquiry notice is absurd. In fact, the September 13, 2006 release "assured the market that the restatement would not affect [CAD] and that MuniMae's high yield dividends – a primary reason to invest in MuniMae – would continue uninterrupted." ¶221 (emphasis added). Subsequently, Defendants apprised investors that MMA was devoting staff to complete the restatement promptly, and even reaffirmed its ability to increase its cash distributions every quarter. ¶¶234-35. The September 2006 announcement did not, however, include any information on the scope of the task that MuniMae faced, its lack of systems, processes, or personnel to accomplish that task, the enormous cost it would entail, or its potential impact on CAD and, consequently, its dividend – the omissions central to Plaintiffs' 1933 Act claims. 33 Act Opp. at 31-32. The September 13, 2006 announcement also did not disclose the known risks that such a restatement would result in a reduction of CAD and the need to restate MuniMae's financials downward by tens of millions of dollars. *Id.*

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[6] *See also* Plaintiffs' Memorandum of Law in Opposition to the Motions of Municipal Mortgage and Equity, LLC, the Individual Defendants, the Director Defendants and Merrill Lynch, Pierce, Fenner & Smith And RBC Capital Markets Corp. to Dismiss the Securities Act of 1933 Claims in the Consolidated and Amended Class Action Complaint ("33 Act Opp."), Dkt. No. 86, at 10-11, 30.

Likewise, Defendants' reliance on the January 31, 2007 press release, entitled "MuniMae Announces 40th consecutive Increase in Quarterly Distribution," is equally unavailing. The January 31, 2007 press release spends three pages touting MuniMae's success and then notes that MuniMae will be required to consolidate its LIHTCFs. Noticeably absent is any disclosure that MuniMae was in violation of accounting rules, including FIN 46R, or regarding the financial impact of consolidating these funds or the time and financial expense that MuniMae's restatement would require. Finally, the January 31, 2007 press release makes no mention of the impact such a consolidation would have on MuniMae's dividend distributions, shareholders' equity, or income. *Id.* In fact, these announcements were materially false and misleading themselves, and therefore, could not trigger inquiry notice.

Finally, Defendants claim that MuniMae withdrew the DRP registration statement on May 3, 2006. *See* July 29 Letter and Exhibit B thereto. However, Exhibit B only states that "we hereby remove from registration 348,204 common shares registered but not offered pursuant to the Registration Statement on Form S-3" because "the registrant has not timely filed its annual report on Form 10-K for the year ended December 31, 2005 . . ." *See* Ex. B to July 29 Letter. However, the DRP registration statement on Form S-3, which established the DRP and was filed with the SEC on September 4, 1997, provides for 450,000 ***Growth Shares*** and does not even mention common shares.[7]

The Complaint alleges that the Company declared dividends and that Plaintiffs Felix and Engel purchased Growth Shares "pursuant and/or traceable to the DRP Registration Statement and Prospectus, the amendments thereto, and the documents incorporated therein and thereafter by reference, that contained misrepresentations and/or omissions of material fact" until November 2007.[8] Thus, Defendants' assertion that the DRP registration statement was withdrawn on May 3, 2006, is not dispositive of the issue. In fact, MuniMae's filing with the SEC on March 3, 2008 of Form 25 (Notification of Removal from Listing and/or Registration Under Section 12(b) of the Securities Exchange Act of 1934) specifically refers to the removal of Growth Shares (which were the shares at issue in the DRP registration statement) from listing and registration. *See* Ex. E.[9] Thus, the most plausible (and Plaintiffs need only provide a plausible) inference is that the Growth Shares were not removed from registration until March 3, 2008.

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[7] *See* Ex. 1 to Declaration of Sarah P. Swanz, Dkt. No. 77.

[8] *See* ¶¶101, 104. *See also* Dkt. No. 1 (certification of Plaintiff Engel submitted with the complaint) and Ex. A to Dkt. No. 21 (certification of Plaintiff Felix) in *Engel v. Municipal Mortgage & Equity, LLC, et al.*, 1:08-cv-00292-MJG (D. Md.).

[9] The exhibit is a true and correct copy of a filing made by MuniMae with the SEC for which it is proper for the Court to take judicial notice. *See Greenhouse v. MCG Cap. Corp.*, 392 F.3d 650, 655 n.1 (4th Cir. 2004).

Respectfully yours,

Charles J. Piven
and
Sherrie R. Savett

Securities Plaintiffs' Co-Lead Counsel

Cc: All Counsel of Record